

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

PLUSFIVE HOLDINGS, L.P.,

No. 06-10307

Debtor(s).  
\_\_\_\_\_  
/

ANDREA A. WIRUM, Trustee,

Plaintiff(s),

v.

A.P. No. 07-1076

OWEN BIRD LAW CORPORATION,

Defendant(s).  
\_\_\_\_\_  
/

Memorandum on Motion to Dismiss

The amended complaint in this adversary proceeding alleges that during the two years prior to the involuntary petition commencing its bankruptcy debtor Plusfive Holdings, L.P., transferred about \$1.4 million to defendant Owen Bird Law Corporation for no consideration. The complaint alleges that defendant was more than a mere conduit even though the funds were taken into its trust account and has liability as an initial transferee pursuant to § 550(a)(1) of the Bankruptcy Code.

Defendant is a Canadian law corporation. It responded to the original complaint by filing a motion to

1 dismiss pursuant to FRCP 12(b)(2) and (b)(6), coupled with a motion in the alternative for summary  
2 judgment. The amended complaint moots the Rule 12(b)(6) argument, leaving the Rule 12(b)(2) motion and  
3 the summary judgment motion before the court. In this memorandum, the court addresses the Rule 12(b)(2)  
4 motion only, and will decide the summary judgment motion separately.

5 Both plaintiff in her complaint and defendant in its brief wrongly argue that in order for the court to  
6 have personal jurisdiction defendant must have contacts California. However, the test in a bankruptcy case is  
7 whether the foreign defendant has the requisite minimum contacts with the United States at large. *In re*  
8 *Pintlar Corp.*, 133 F.3d 1141, 1144-46 (9<sup>th</sup> Cir. 1998); *In re Cruisephone, Inc.*, 278 B.R. 325, 331  
9 (Bkrtcy.E.D.N.Y. 2002).

10 Lack of personal jurisdiction is a defense which can be waived by conduct. The defense is usually  
11 waived when the defendant invokes the judgment of the court on any question other than jurisdiction, such as  
12 seeking summary judgment. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9<sup>th</sup> Cir. 1982); *In re Cash*  
13 *Media Systems, Inc.*, 326 B.R. 655, 671 (Bkrtcy.S.D.Tex. 2005). However, for the reasons stated below  
14 the court has personal jurisdiction over defendant even if it has not waived the defense.

15 The minimum contacts analysis is used to determine whether the exercise of personal jurisdiction  
16 would offend traditional notions of fair play and substantial justice. *Asahi Metal Indus. Co., Ltd., v.*  
17 *Superior Court of California*, 480 U.S. 102, 113 (1987). This analysis is subject to a three-part test: (1)  
18 The nonresident defendant must do some act or consummate some transaction with the forum or perform  
19 some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby  
20 invoking the benefits and protections[;] (2) [t]he claim must be one which arises out of or results from the  
21 defendant's forum-related activities[; and] (3) [e]xercise of jurisdiction must be reasonable. *Omeluk v.*  
22 *Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir.1995).

23 Defendant relies heavily on *Sher v. Johnson*, 911 F.2d 1357 (9<sup>th</sup> Cir. 1990), but the court finds that  
24 reliance misplaced. In that case, a California client brought a malpractice claim against a Florida law firm in  
25 connection with a Florida criminal case. While the court did find personal jurisdiction based on other factors,  
26 it held that “[o]ut-of-state legal representation does not establish purposeful availment of the privilege of

1 conducting activities in the forum state, where the law firm is solicited in its home state and takes no affirmative  
2 action to promote business within the forum state.” 911 F.2d at 1363. In this case, defendant *consummated*  
3 *a transaction* with this country by accepting three large wire transfers, the last of which was very unusual and  
4 suspicious. The claim in this case arises directly from that activity.<sup>1</sup> There is therefore much more than the  
5 mere acceptance of an out-of-state client.

6 The court finds the more applicable case is *Ballard v. Savage*, 65 F.3d 1495 (9<sup>th</sup> Cir. 1995). In that  
7 case, the perpetrator of a Ponzi scheme transferred his “ill-gotten funds” to an Austrian bank. Reversing  
8 dismissal of the bank based on lack of personal jurisdiction, the court employed a “but for” test, holding that  
9 there was personal jurisdiction because but for the bank’s participation the plaintiff would have no claims  
10 against it. 65 F.3d at 1500. See also *Gutierrez v. Givens*, 1 F.Supp.2d 1077, 1081  
11 (S.D.Cal.,1998)[engaging in business transactions with California residents for the purpose of defrauding  
12 other California residents established a basis for jurisdiction over an out-of-state bank]. Similarly, in this case  
13 defendant was an alleged key participant and facilitator of three alleged fraudulent transfers. Accordingly, the  
14 first two requirements for exercise of personal jurisdiction are met.

15 Having found the first two prongs of the test for exercise of personal jurisdiction are present, the  
16 court must consider whether the exercise of jurisdiction is reasonable. A simple review of defendant’s  
17 website shows that it is an international law firm which acts for many clients “located in Canada, the United  
18 States, Japan and England.” It boasts being a member of InterLaw, “an international association of  
19 independent law firms in major world centres.” Having purposely availed itself of U.S. business, it is entirely  
20 fair and reasonable that defendant be subject to U.S. jurisdiction.<sup>2</sup> Moreover, litigation in this country hardly

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22                   <sup>1</sup>The mere acceptance of a wire transfer for an ordinary purpose, such as a retainer, would not  
23 constitute an act in the U.S. However, where a wire transfer is fraudulent it is deemed to be of two parts: the  
24 initiation of the transfer and the completion of the transfer. *Roanoke Cement Co., LLC v. Chesapeake*  
*Products, Inc.*, 2007 WL 2071731 (E.D.Va.,2007). Thus, by accepting the wire transfers defendant  
completed and consummated a transaction with the U.S.

25                   <sup>2</sup>If the website and InterLaw membership are considered solicitation of U.S. business, then those acts  
26 alone are sufficient to establish personal jurisdiction in the U.S. See *Decker Coal Co. v. Commonwealth*

1 seems to be a burden to defendant. Not only has it readily obtained U.S. counsel, but (as noted above) it has  
2 filed a detailed motion for summary judgment on the merits of the action. It is obviously important to a debtor  
3 in U.S. bankruptcy court that a U.S. bankruptcy court hear its avoidance actions. The court therefore finds  
4 that all three prongs of the test for exercise of personal jurisdiction have been met.

5 For the foregoing reasons, defendant's motion to dismiss for lack of personal jurisdiction will be  
6 denied. Counsel for plaintiff shall submit an appropriate form of order.

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8 Dated: March 20, 2008

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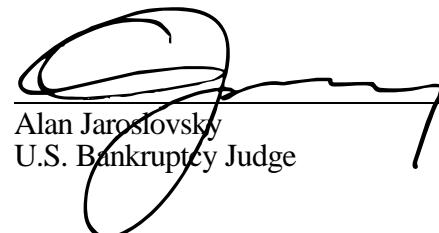
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Alan Jaroslovsky  
U.S. Bankruptcy Judge

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25 *Edison Co., 805 F.2d 834, 840 (9<sup>th</sup> Cir. 1986)*[“if the defendant directly solicits business in the forum state,  
26 the resulting transactions will probably constitute the deliberate transaction of business invoking the benefits of  
the forum state’s laws.”]